UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

EVERGLADES COLLEGE, INC., d/b/a KEISER UNIVERSITY and EVERGLADES UNIVERSITY,

Respondent,

and

Case 12-CA-096026

LISA K. FIKKI, an Individual.

RESPONDENT'S EXCEPTIONS TO THE ALJ'S DECISION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Everglades College, Inc. d/b/a Keiser University and Everglades University ("Respondent"), by and through its undersigned counsel, submits these exceptions to the August 14, 2013 decision of Administrative Law Judge Melissa M. Olivero.

EXCEPTIONS

FINDINGS OF FACT

1. Respondent takes exception to the ALJ's findings and/or conclusions on page 4,

LL16-17 that, "[i]n response to a question, Arnett also told Fikki that she would have
ample time to seek legal counsel," because they are not supported by the evidence.

The hearing testimony cited in the Decision in support of these findings actually
reads: "And then I asked [Arnett] again if I would have the time to review the
documents. Would I have ample time, I specifically stated, and [Arnett] stated you
have until Friday at 2:00 p.m."

DISCUSSION AND ANALYSIS

- B. INTERFERENCE WITH EMPLOYEE RIGHTS TO FILE CHARGES WITH THE BOARD
- 2. Respondent takes exception to the ALJ's findings and/or conclusions on page 5, LL34-41, that "the EAA's broad language, applying to all causes of action for discrimination or harassment under Federal, State, or local laws, would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. . . . An employee could easily construe the EAA to require arbitration of claimed violations of the [National Labor Relations Act], a Federal law. Therefore, I find that the language of the EAA is reasonably read to require employees to resort to Respondent's arbitration procedures instead of filing charges with the Board," on the grounds that they are not supported by substantial evidence and are inconsistent with the law.
- 3. Respondent takes exception to the ALJ's findings and/or conclusions on page 5, LL43-47 and page 6, LL1-7 that, "[b]uried within the EAA is an exception to the requirement that employees arbitrate all employment-related claims against Respondent. The EAA requires arbitration of all employment-related claims, including those brought pursuant to Federal law, 'except where specifically prohibited by law.' In this regard the language of Respondent's EAA differs from that in <u>D.R. Horton</u>, supra. The inclusion of this exception does not cause me to reach a different result than that in <u>D.R. Horton</u>. The phrase 'except where specifically prohibited by law' is ambiguous. Employees cannot be expected to possess a working knowledge of all Federal, State, and local laws which specifically prohibit mandatory arbitration of claims. Respondent made no effort to explain to its employees what is meant by this phrase. Consistent with established Board

- precedent, the ambiguity in the EAA must be held against Respondent," on the grounds that they are not supported by substantial evidence and are inconsistent with the law and the facts of this case.
- 4. Respondent takes exception with the ALJ's reliance on <u>U-Haul Co. of California</u>, 347 NLRB 375 (2006), page 6, LL 9-17, because the ALJ should have found that case distinguishable from this case.
- 5. Respondent takes exception to the ALJ's findings and/or conclusions on page 6, LL 19-25 that "the Board has held unlawful an employee arbitration agreement containing an exception similar to that in the instant case. In 2 Sisters Food Group, Inc., 357 NLRB NO. 168 slip. op. at 2 (2011), an employee arbitration agreement was limited to claims 'that may be lawfully resolved by arbitration.' The Board held this limitation was not effective because most nonlawyer employees would not be sufficiently familiar with the limitations the Act imposes on mandatory arbitration. The language in Respondent's EAA is similarly vague and ineffective," on the grounds that they are not supported by substantial evidence and are inconsistent with the law.
- 6. Respondent takes exception to the ALJ's findings and/or conclusions on page 6, LL27-30 that, "the language of Respondent's EAA would reasonably lead employees to believe that they are barred from exercising their right to file charges with the Board. As such, I find that the Respondent violated Section 8(a)(1) of the Act by maintaining the Employee Arbitration Agreement," on the grounds that they are not supported by substantial evidence and are inconsistent with the law.

C. PROHIBITION ON CLASS OR COLLECTIVE ACTION

7. Respondent takes exception to the ALJ's findings and/or conclusions on page 7, LL8-17, that "Respondent's argument that its EAA does not Irlun afoul of the Act because it does not preclude an employee from bringing a claim with an administrative agency, and nothing would bar the agency from filing a class or collective claim is flawed. The EAA does not explain that the filing of a charge with an administrative agency is intended to be an exception to its broad list of claims that must be brought to arbitration pursuant to its terms. I have already found the 'except where specifically prohibited by law' language of Respondent's EAA is vague and that a reasonable employee would not understand that he or she could bring charges to the Board instead of an arbitrator. By analogy, I reject Respondent's argument that the EAA would not prevent an employee from bringing a charge to an administrative agency, which could then bring a class or collective action in court," on the grounds that they are not supported by substantial evidence and are inconsistent with the law. 8. Respondent takes exception to the ALJ's findings and/or conclusions on page 7. LL19-10 that, "Respondent violated Section 8(a)(1) of the Act by requiring employees to waive their right to collectively pursue employment-related issues," on the grounds that they are not supported by substantial evidence and are inconsistent

D. RESPONDENT VIOLATED THE ACT IN DISCHARGING LISA FIKKI

with the law.

9. Respondent takes exception to the ALJ's findings and/or conclusions on page 7,

LL25-26 that, "Respondent's argument that it lawfully discharged Fikki for [her
failure to complete the re-boarding process in a timely fashion] is without merit,"

- on the grounds that they are not supported by substantial evidence and are inconsistent with the law.
- 10. Respondent takes exception to the ALJ's findings and/or conclusions on page 7,

 LL28-29 that, "Respondent chose to discharge [Fikki] before she could obtain any
 such legal advice," on the grounds that they are not supported by substantial
 evidence.
- Respondent takes exception to the ALJ's findings and/or conclusions on page 7,

 LL31-33 that, "Fikki was discharged for refusing to sign Respondent's EAA.

 Therefore, as I have found that the language of Respondent's EAA is unlawful, the discharge of Fikki was also unlawful," on the grounds that they are not supported by substantial evidence, are inconsistent with the law, and the case law relied upon by the ALJ is distinguishable on the facts.
- 12. Respondent takes exception to the ALJ's findings and/or conclusions on page 7,

 LL37-40 that, "it does not matter whether or not Respondent provided Fikki a

 reasonable amount of time to consult an attorney, because the Employee Arbitration

 Agreement is unlawful and the discharge of Fikki for failing to sign it is also

 unlawful," on the grounds that they are not supported by substantial evidence and are

 inconsistent with the law.
- 13. Respondent takes exception to the ALJ's findings and/or conclusions on page 7,

 LL40-41 and page 8, LL2-4 that, "discharging employees for refusing to sign an

 unlawful arbitration agreement violates Section 8(a)(1) of the Act... [a]ccordingly,

 Respondent's discharge of Fikki for her failure to sign its unlawful Employee

- Arbitration Agreement violates Section 8(a)(1) of the Act," on the grounds that they are not supported by substantial evidence and are inconsistent with the law.
- 14. Respondent takes exception to the ALJ's findings and/or conclusions on page 8, LL512 that, "Respondent's argument that its discharge of Fikki was somehow lawful
 under the framework of <u>Wright Line</u>, 251 NLRB 1083 (1980), <u>enf'd</u>, 662 F. 2d 899

 (1st Cir. 1981), is misplaced [because] [t]here is no question as to the reason for the
 [sic] Fikki's discharge. As I have found, Respondent discharged Fikki for her refusal
 to sign its unlawful Employee Arbitration Agreement," on the grounds that they are
 not supported by substantial evidence and are inconsistent with the law.
- 15. Respondent takes exception to the ALJ's findings and/or conclusions on page 8,

 LL14-21 rejecting the argument that <u>D.R. Horton</u> was wrongly decided, on the

 grounds that they are inconsistent with numerous court decisions.
- 16. Respondent takes exception to the ALJ's findings and/or conclusions on page 8,

 LL23-30 rejecting the argument that the Board lacked a valid quorum when the <u>D.R.</u>

 Horton decision was rendered, on the grounds that they are inconsistent with the law.

CONCLUSIONS OF LAW

17. Respondent takes exception to the ALJ's findings and/or conclusions on page 8,

LL37-40 that, "[b]y maintaining and requiring its employees to sign its Employee

Arbitration Agreement, which requires employees to waive their rights to maintain class or collective actions and which employees reasonably would believe bars or restricts them from exercising their right to file charges with the Board, Respondent has violated Section 8(a)(1) of the Act," on the grounds that they are not supported by substantial evidence and are inconsistent with the law.

- 18. Respondent takes exception to the ALJ's findings and/or conclusions on page 8, L42 and page 9, LL1-2 that, "[b]y discharging Lisa K. Fikki for her refusal to sign the unlawful Employee Arbitration Agreement, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act, on the grounds that they are not supported by substantial evidence and are inconsistent with the law.
- 19. Respondent takes exception to the ALJ's findings and/or conclusions on page 9, L4 that Respondent engaged in "unlawful conduct," on the grounds that they are not supported by substantial evidence and are inconsistent with the law.

REMEDY

- 20. Respondent takes exception to all aspects of the ALJ's proposed remedy in pages 9 and 10 of the decision.
- 21. Respondent takes exception to the ALJ's proposed remedy in page 9, LL13-17 that
 Respondent "shall rescind or revise the EAA to make it clear that the agreement does
 not constitute a waver in all forums of employees' right to maintain employmentrelated class or collective actions," on the grounds that they are not supported by
 substantial evidence and are inconsistent with the law.
- 22. Respondent takes exception to the ALJ's proposed remedy in page 9, LL31-35 that Respondent "must offer [Fikki] reinstatement and make her whole for any loss of earnings and other benefits, on the grounds that it is not supported by substantial evidence and is inconsistent with law.
- 23. Respondent takes exception to the ALJ's proposed remedy in page 9, LL38-41 that Respondent "shall file a report with the Social Security Administration allocating

back pay to the appropriate calendar quarters. Respondent shall also compensate the discriminate for the adverse tax consequences, if any, of receiving one or more lumpsum back pay awards covering periods longer than 1 year."

- Respondent takes exception to the ALJ's proposed remedy in page 9, LL44-46 that

 Respondent "remove from its files any references to the unlawful discharge of Lisa K.

 Fikki, and to notify her in writing that it has done so, and that the discharge will not be used against her in any way."
- 25. Respondent takes exception to the proposed remedy in page 10, LL1-4 that

 Respondent "shall be required to post a notice to employees at all facilities at which
 employees were subject to its unlawful Employee Arbitration Agreement, on the
 grounds that it is not supported by substantial evidence and is inconsistent with law.

ORDER

- 26. Respondent takes exception to all aspects of the ALJ's proposed Order, on pages 1012, on the grounds that it is not supported by substantial evidence and is inconsistent with the law.
- 27. Respondent takes exception to the ALJ's proposed Notice to Employees attached to the ALJ' order, on the grounds that it is not supported by substantial evidence and is inconsistent with the law.
- 28. Respondent takes exception to the ALJ's conclusions, remedy and order because they contravene the Federal Arbitration Act.

Wherefore, Respondent requests that the ALJ's decision be reversed for the reasons set out herein and in Respondent's Brief in Support of Exceptions.

Respectfully submitted this 11th day of September, 2013.

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STATEMENT OF SERVICE

I hereby certify that on September 11, 2013, I e-filed a copy of the foregoing with the NLRB and served a copy of the foregoing on Charging Party Lisa K. Fikki by email at <u>Lisa@fikki.net</u> and John King, Counsel for Acting General Counsel, by email john.king@NLRB.gov.

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